

EX PARTE OR LATE FILED

National Cable Television Association

Neal M. Goldberg
General Counsel

1724 Massachusetts Avenue, Northwest
Washington, D.C. 20036-1969
202 775-3664 Fax: 202 775-3603

April 24, 1997

EX PARTE

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

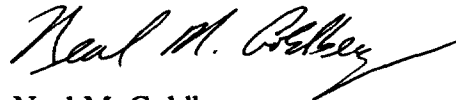
Re: CC Docket No. 96-45
Federal-State Joint Board on Universal Service

Dear Mr. Caton:

Enclosed for filing, on behalf of the National Cable Television Association, are an original and one copy of an ex parte presentation submitted this day in the above-captioned proceeding.

Please direct any questions concerning this matter to the undersigned.

Sincerely,



Neal M. Goldberg

Attachment

cc: Blair Levin, Esquire
Thomas Boasberg, Esquire
James Coltharp, Esquire
James Casserly, Esquire
Daniel Gonzalez, Esquire
Regina Keeney, Chief, Common Carrier Bureau
A. Richard Metzger, Jr., Deputy Chief, Common Bureau
John Nakahata, Acting Chief, Competition Division

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EX PARTE PRESENTATION OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.
CC DOCKET 96-45 - UNIVERSAL SERVICE

**TO MINIMIZE LITIGATION RISK, FUNDING FOR SCHOOLS AND LIBRARIES
SHOULD BE STRUCTURED ALONG SERVICE LINES
RATHER THAN BY SERVICE PROVIDER**

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Federal Communications Commission
Office of General Counsel

Introduction and Summary

In order to minimize the risk of stay of all or part of the universal service order, it has been suggested that funding for schools and libraries be structured in a "severable" fashion. NCTA agrees that the universal service order must be written to preclude, to the maximum extent feasible, the possibility of a judicial stay. That goal is most effectively accomplished by adopting a structure that best reflects the language and legislative history of section 254(h).

As the statutory language and accompanying legislative history make clear, Congress itself separated the provision of telecommunications services and access to advanced services such as Internet access. Moreover, the directive to the Commission to "enhance" the latter did not distinguish on the basis of service provider; to the contrary, Congress ordered the Commission to establish competitively neutral rules. The Joint Board's recommended decision fairly reflected these statutory requirements.

Discussion

1. **Section 254(h)(1)(B) applies only to the provision of telecommunications services by telecommunications carriers.** The language of the statute is clear: telecommunications carriers must provide a discount to schools and libraries for "any of its services that are within the definition of universal service under [section 254](c)(3)." Subsection (c) generally defines which telecommunications services should be included in the definition of universal service; in this context, it is clear that subsection (c)(3) authorizes the Commission to designate additional telecommunications services for schools and libraries as eligible for universal service support. This interpretation finds direct support in the Joint Board's Recommended Decision^{1/} and in the legislative history accompanying section 254(h)(1)(B).^{2/}

^{1/} Recommended Decision at ¶ 459.

^{2/} New section (h)(1)(B) requires that any telecommunications carrier shall, upon a bona fide request, provide services . . . included in the definition of universal service under new subsection (c)(3) . . . at rates that are less than the amounts charged for similar services to other parties, and are necessary to assure affordable access to and use of such telecommunications services.

2. Section 254(h)(2)(A) addresses the provision of advanced services by carriers and non-carriers alike. Section 254(h)(2) deals not with telecommunications services, but rather directs the Commission to establish "competitively neutral rules to enhance . . . access to advanced telecommunications and information services" for schools, libraries, and health care providers.^{3/} Consistent with the mandate for competitive neutrality and the fact that "access to advanced telecommunications and information services" is different from "telecommunications," the Joint Board correctly found that section 254(h)(2)(A) confers eligibility for support on both carriers and non-carriers.^{4/} The Joint Board has held that services under section 254(h)(2)(A) would include Internet access,^{5/} which virtually all commenters in this proceeding agree is not a telecommunications service.

Section 254(h)(2)(A) thus differs significantly from section 254(h)(1)(B), which contemplates that telecommunications carriers will receive universal service support in connection with the provision of telecommunications services they provide.^{6/}

3. Structuring support for schools and libraries by service provider rather than along service lines poses the greatest risk of a stay. The statutory language and legislative history permit support for schools and libraries to be bifurcated -- but only between telecommunications services and other services. Congress recognized that universal services for schools and libraries should include more than just telecommunications services and enacted section 254(h)(2) to cover the provision of advanced services on a competitively neutral basis, i.e., by carriers and non-carriers alike.

^{3/} 47 U.S.C. § 254(h)(2)(A) (emphasis added).

While section 254(h)(2) does not explicitly authorize disbursements from a universal service fund, the directive to the Commission to "establish competitively neutral rules" is sufficient to empower the agency to include funding for advanced services as part of whatever universal service support mechanism it adopts. Indeed, despite the shorthand references to a universal service "fund" in this proceeding, nothing in section 254 authorizes the creation of such a fund. Rather, to avoid arguments over whether universal service requirements constituted a new tax, Congress avoided any specific references to a universal service "fund" and spoke instead in terms of "mechanisms" to preserve and advance universal service; universal service "support"; and a carrier's universal service "obligation." See, e.g., 47 U.S.C. §§ 254(d); 254(e); 254(h)(1)(A). In this context, the lack of a specific reference to a fund in section 254(h)(2) does not suggest any legislative intent to preclude support for advanced services.

^{4/} Recommended Decision at ¶¶ 462-63.

^{5/} Id. at ¶ 462.

^{6/} When Congress wanted to limit advanced services obligations to carriers, it did so expressly. See id. § 254(h)(2)(B).

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Attempting to find authority to support advanced services in section 254(h)(1) poses a substantial litigation risk. First, such an interpretation is vulnerable to attack because it is contrary to the language and expressed intent of Congress to limit that section solely to telecommunications services. Second, to the extent such an expansive reading of section 254(h)(1) is intended to insulate carrier-provided advanced services from the effects of a possible stay of section 254(h)(2), it is not competitively neutral.

Finally, if telecommunications and advanced services are mixed together in section 254(h)(1)(B) and a court decides to stay support for advanced services, there is a substantial risk of a stay of section 254(h) in its entirety. Rather than having preserved some support for schools and libraries through this broad interpretation of section 254(h)(1), the Commission will have effectively deprived schools of discounted telecommunications services while the litigation over advanced services is pending.

Combining carrier and non-carrier eligibility for advanced services support under section 254(h)(2) avoids these risks -- and still leaves a court with the option of selectively staying the Commission's rules to the extent it finds that non-carriers are otherwise ineligible to receive such support.

Conclusion

The Commission should adopt the Joint Board's recommendation to fund support for advanced services on a competitively neutral basis -- for carriers and non-carriers alike -- under section 254(h)(2).